No. 11,891

United States Circuit Court of Appeals

For the Ninth Circuit

ERNEST TSANG,
Appellant,

vs.

JOHN JOSEPH KAN,
Appellee.

Appellant's Opening Brief

ROBERT E. HATCH,
The Mills Tower,
San Francisco 4,
Attorney for Appellant.

LEMUEL H. MATTHEWS,
1 Montgomery Street,
San Francisco 4,
Of Counsel for Appellant.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

Subject Index

	Page
Statement of the Pleadings and Jurisdictional Factors	1
Statement of the Case	2
Argument	7
(1) The Judgment Appealed From Is Contrary to Law in That the Judgment of the State Court Was Res Judicata	7
(2) The Award of Damages Was Contrary to the Evidence and Law Applicable Thereto	15
(3) The Expiration of the Partnership Term Barred Any Relief	16
(4) Petitioner Was Estopped From Any Relief	17
Miscellaneous	18
Conclusion	18

Table of Authorities Cited

Pages

CASES

Bennett v. Com. Int. Rev., 113 Fed.2d 837 8

Continental Bank v. Holland Bank, 66 Fed.2d 823 15
Cromwell v. County of Sac., 94 U.S. 351; 24 L.Ed. 195 ..... 11, 12

Donald v. White Lumber Co., 68 Fed.2d 441 8

Forsyth v. Hammond, 166 U.S. 506; 41 L.Ed. 1095 14

Gottschalk Mfg. Co. v. Springfield Wire Co., 90 Fed.2d 468, 471 ..... 8, 13

Henderson v. U. S. Radiator Corp., 78 Fed.2d 674 12

Last Chance Mining Co. v. Tyler Mining Co., 157 U.S. 687; 39 L.Ed. 859, 863 11
Lineker v. Marshall, 7 Fed.2d 878 (C.C.A. 9th) 13

National Surety v. Ellison, 88 Fed.2d 309 14
New Orleans v. Citizens Bank, 167 U.S. 371; 42 L.Ed. 202 12

Southern Pacific Ry. Co. v. United States of America, 168 U.S. 1; 42 L.Ed. 355, at page 377 ..... 10, 12

Tait v. West Maryland Railroad, 289 U.S. 620; 53 S.Ct. 706 12
Tillman v. National City Bank, 118 Fed.2d 631 8

Union Bleachery v. United States, 73 Fed. Supp. 496 (1947) 12
United States v. Moser, 266 U.S. 236; 45 S.Ct. 66 11

Vapor Car Heating v. Cold Car Heating, 7 Fed.2d 284, 287 12

STATUTES

California Civil Code, Section 2483 3
California Code of Civil Procedure, Sections 1908, 1909 8

Selective Training and Service Act of 1940, as amended, Section 8 (50 U.S.C.A. App. 308) 1
Service Extension Act of 1941, as amended, Section 7 (50 U.S.C.A. App. 357) 1

TEXTS

30 American Jurisprudence, Section 178, pp. 920-922 10

34 Corpus Juris at page 742 9

No. 11,891

United States Circuit Court of Appeals

For the Ninth Circuit

Ernest Tsang,	*Appellant,*
vs.	
John Joseph Kan,	*Appellee.*

Appellant's Opening Brief

STATEMENT OF THE PLEADINGS AND JURISDICTIONAL FACTORS

The pleadings consist simply of the Petition of John Joseph Kan (Tr. 1) and the Answer of Ernest Tsang (Tr. 5), together with a Supplement to said Answer (Tr. 12).

According to the Findings of Fact, jurisdiction in this case was pursuant to Section 8 of the Selective Training and Service Act of 1940, as amended, 50 U.S.C.A. App. 308, and Section 7 of the Service Extension Act of 1941, as amended, 50 U.S.C.A. App. 357.

STATEMENT OF THE CASE

The facts in this case are without substantial dispute. As reflected in the Memorandum Opinion (Tr. 15) and the Findings of Fact (Tr. 20) appellant Ernest Tsang and appellee John Kan, with others, were stockholders in a California corporation by the name of The Cathay House. It operated a restaurant at 718 California St., San Francisco. At the time concerned, Kan and others owned minority shares while Tsang owned a majority of the stock; Tsang was president, Kan was not an officer and the immediate operation of the business was by Tsang and Kan as co-managers, each one drawing a salary of $500.00 a month, fixed by the Board of Directors.

The corporate history disclosed an almost vitriolic enmity between Kan and Tsang. Originally they with others were stockholders and officers. When business was bad and additional capital was needed, Kan either would not or could not furnish more money and the burden of producing further funds fell upon Tsang. Because of this, over a period of years Tsang purchased additional blocks of stock until it reached the point where he owned over one-half of the outstanding capitalization. Finally, Tsang was elected to the presidency and Kan was voted out of executive office.

On July 23, 1943, Kan enlisted as a private in the United States Army. Four months and three days later he received a discharge. The entirety of this service was in California and Michigan. During all of this time Helen Kan, wife of appellee, also one of the employees and a stockholder, held a power of attorney from John Kan, with the admonition that on all matters affecting The

Cathay House she should consult with his San Francisco attorney, Sidney A. Romer.

During the period of Kan's service, a limited partnership known as The Cathay House was organized to take over the business. This was in accord with the then trend to avoid the high corporation and excess profits taxes and to avail of the more favorable taxes appertaining to copartnerships. The Articles of Copartnership were subscribed to by Kan through his wife as attorney in fact, after first receiving the approbation of their said attorney. The limited partners were the same persons with the identical proportions as the stockholders in the corporation; also Tsang was designated as the sole general partner.*

The partnership took over the business on October 1, 1943 and by the provision of the articles, was to exist for a period of three years thereafter.

Shortly thereafter, Kan, upon his emergence from the army, returned to San Francisco and consulted Tsang with regard to going back to work. There followed a series of meetings between the two with an undercurrent of unfriendliness due to the great strife between these two individuals during the corporate existence preliminary to Kan's enlistment. Tsang was skeptical of Kan's protestations of good intentions, being dubious that if Kan returned he would not revert to his tendencies toward trouble making and insubordination. For a clarification of the picture he arranged a meeting with Kan in the

---

*Because of this he alone was the one responsible for the debts of the enterprise, the others being invulnerable; 2483 California Civil Code.

office of the company's attorney, Robert E. Hatch. Another such meeting ensued wherein Mr. Romer joined.

There on behalf of the partnership Tsang, with the concurrence of George Chew, the company's secretary, offered to employ Kan at the same rate of compensation as before ($500.00 per month). Through a misunderstanding by Romer because he had not been present in the previous meeting, or otherwise, Kan refused the offer until he was given a written contract for a three year employment. This counter-offer was rejected by Tsang, for Kan had always been on a month to month basis and was not morally or legally entitled to a more extended commitment, in writing or otherwise. The parties remained at loggerheads.

In fact, Kan never again was employed at The Cathay House. However, he made various public claims of mistreatment, including a complaint to the Selective Service authorities. As a result, Tsang filed a suit in declaratory relief in the San Francisco Superior Court on October 21, 1944, being No. 333,586, averring that Kan was making various and sundry claims, the nature and extent of which could not be determined, and praying that Kan be compelled to set forth his claims in full and then that the court declare the rights and obligations of the parties under the circumstances. To this Kan filed an answer and cross-complaint, setting up two causes, *specifically referring* to the Selective Training and Service Act of 1940 as amended, claiming that he was entitled to $750.00 per month, that it had not been paid to him, and that less the amount he had actually received elsewhere, he had been damaged in the sum of $7,870.00; secondly, that be-

cause of Tsang's "fraud" in the premises, he had sustained an additional $25,000 of damage.*

The case proceeded to trial in the San Francisco Superior Court, Hon. Frank T. Deasy, judge presiding, and concluded in a judgment for Tsang on all grounds. Kan appealed, whereupon there was an unqualified affirmance, remittitur issued and the judgment became final long before the trial of the present case.

In that judgment was incorporated formal Findings of Fact and Conclusions of Law (Resp. Exhibit A). The facts found included:

1. Kan's job before his war service was for $500 per month, the period being at the pleasure of the employer.
2. There was no agreement that he would be entitled to any increase at any time, particularly he was not to receive increases equivalent to those that might be granted to Tsang.
3. Kan voluntarily consented to the transfer from the corporation set up to the partnership.
4. Within three months of his return from the service, the partnership offered him the same position he had had with the corporation, but that Kan refused to accept it.
5. Kan has never offered to return to a position of like seniority, status or pay.
6. Kan has suffered no damages.

---

*We emphasize that it was Kan who selected the State Court as the tribunal to hear his plaint. The G. I. Bill of Rights was not mentioned in Tsang's complaint. Defendant Kan had the choice not to submit that issue in that case, but could have filed then in the Federal Court the very complaint upon which the present case is founded. It is not a situation where he was deprived of the right to have the Federal Court rule on his claims; rather he voluntarily chose the forum, then not being satisfied with the outcome, wants a rehearing by another court. (So do all other unsuccessful litigants.)

7. Kan's conduct has been such that the employer has good and sufficient reason to believe that Kan would not be a suitable person to be employed by it.

With those facts, obviously, no court with legal propriety could grant Kan any relief against Tsang, for damages, for restitution of job, or otherwise.

The present action was commenced on April 18, 1946 (Tr. 3). The petition admittedly recites the same facts as involved in the State Court action. This appellant urged the bar of the State Court action and the special defense was heard in advance of the trial of the other issues.

At the pretrial (Tr. 36-61) it was Tsang's contention that whether or not the previous decision was binding upon the Federal Court in respect to points of law already adjudicated, it was positively binding as to any findings of *fact;* that the facts found by the State Court, particularized next above, were such as to form an absolute bar to any relief which the Federal Court or any other court could give under the Selective Training Act. In reply, Kan's counsel stated there was a differentiation of the two suits in that the former was one for damages, not for a restoration, while this action, so he said, was for the equitable relief for restoration to employment, not for damages.

The case proceeded to general trial on September 10, 1947 (Tr. 62). It developed that meanwhile the copartnership had gone out of business,* whereupon the same at-

*First, because of the expiry of the three-year period for which the partnership was formed; secondly, because Kan brought another suit in the State Court (No. 349,840) for a judicial dissolution.

torneys for Kan blandly announced to the court that they were now not asking for a restoration of employment, but for damages.

In other words, at the two hearings in 1946, they conceded that the right to damages was barred by the decision of the Superior Court and procured the District Court to hear the case because it was for different (equitable) relief. Then when the case reached trial in 1947, they urged a claim for damages alone!

The District Court held for Kan, filing a Memorandum Opinion and awarded "damages" to him in the amount of $7,481.28, being twelve months pay at $750.00 a month less the amount actually elsewhere earned by him during that period. From such an adjudication this appeal is prosecuted.

ARGUMENT

(1) The Judgment Appealed From Is Contrary to Law in That the Judgment of the State Court Was Res Judicata.

It is not necessary for us to contend that the State Court's judgment on the law precluded the Federal Court from reaching an independent legal conclusion.*

Our primary contention always has been and now is that the findings of the State Court as to the *facts* precluded the Federal or any other court from subsequently finding those facts to be to the contrary; taking the facts as found by the State Court, no relief properly could be given to the plaintiff by any court.

Clearly the Superior Court of the State of California

---

*The Selective Service Act does not provide the Federal Court has exclusive jurisdiction, merely that it shall have the power to enforce it (Tr. 48). We contended the State Court had concurrent jurisdiction (Tr. 43-44). The District Court apparently was inclined to agree (Tr. 48).

was one of general jurisdiction; the action there was in personam; both plaintiff and defendant were residents of the State of California and they voluntarily submitted to its jurisdiction. With the Superior Court's unquestioned jurisdiction, its adjudication estopped Kan from claiming to the contrary in this and in all other jurisdictions.*

The point was pleaded as the First Defense and Second Defense in the Answer (Tr. 5) and was proved by the admission in evidence of the pleadings, Findings of Fact, Conclusions of Law and the Judgment in the state court action (Resp. Exhibit A, Tr. 38).†

Additionally, the District Court had before it the opinion of the District Court of Appeal of the State of California affirming the judgment of the Superior Court, reported 78 Cal. App. 2d 275; 177 Pac. 2d 630.

In the Memorandum Opinion filed by the District Judge, it is stated (Tr. 17):

> "Respondent's defense of res judicata is based on the foregoing State Court proceedings. It is true that the State Court made a finding that Respondent Tsang and the partnership had offered to restore Kan to the same position which he held with the Cathay House corporation, but even assuming that

---

*In the State of California where Kan first chose to present his case, the rule of *res judicata* has been codified. Both sections 1908 and 1909 of the California Code of Civil Procedure specifically compel California courts to recognize judgments of federal courts. The federal courts should give the same recognition to California judgments.

†Actually, it was not necessary to plead the defense; mere proof was sufficient. See *Gottschalk Mfg. Co. v. Springfield, Wire Co.*, 90 Fed. 2d 468; *Tillman v. National City Bank*, 118 Fed. 2d 631; *Bennett v. Com. Int. Rev.*, 113 Fed. 2d 837; *Donald v. White Lumber Co.*, 68 Fed. 2d 441.

such an offer met the Act's requirements *this finding cannot bind a Federal Court.*" (Emphasis supplied)

In this determination it is submitted that, by established authority both in the Federal and State Courts of the United States, the trial judge was in error. The findings of fact of the State Court in a matter wherein it has jurisdiction are binding on the Federal Court under the recognized theory of estoppel by judgment.

The general principles of *res judicata* are set forth in 34 *Corpus Juris* at page 742, as follows:

> "Statement and Grounds of Doctrine. The doctrine of res judicata, first definitely formulated in the Duchess of Kingston's case, embodies two main rules, which may be stated as follows: (1) the judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal. (2) Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not."

Complete dissertation upon the rule, its function and necessities in giving finality to judicial actions and its estoppel against subsequent litigation concerning the same subject matter, is found in the pages immediately following the above quotation.

The pertinent rule is set forth in 30 *American Jurisprudence,* Section 178, pp. 920-922, as follows:

> "It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form the issue may take in the subsequent action, whether the subsequent action involves the same or a different form of proceeding or whether the second action is upon the same or a different cause of action, subject matter, claim, or demand, as the earlier action. In such cases, it is also immaterial that the two actions are based on different grounds, or tried on different theories, or instituted for different purposes, and seek different relief."

For the federal courts this rule was clearly enunciated by Mr. Justice Harlan of the United States Supreme Court in *Southern Pacific Ry. Co. v. United States of America,* 168 U.S. 1; 42 L.Ed. 355, at page 377:

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; *and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.* This general rule is demanded by the very

> object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them." (Emphasis supplied)

The rule was previously set forth in *Cromwell v. County of Sac.,* 94 U.S. 351; 24 L.Ed. 195, where it is stated that in subsequent actions between the same parties where different relief is sought, estoppel by judgment is applied as to those matters which were actually litigated in the original action.

In *Last Chance Mining Co. v. Tyler Mining Co.,* 157 U.S. 687; 39 L.Ed. 859, 863 the Supreme Court states:

> "The essence of estoppel by judgment is that there has been a judicial determination of a fact * * *. Findings of fact, although not provided for by statute, are a declaration by the Court of the matter which it determines."

Again in *United States v. Moser,* 266 U.S. 236; 45 S.Ct. 66, an action was brought by a retired Naval Captain claiming retired pay. It had been previously determined in the Court of Claims that he had been "in service during the Civil War" including his term as a cadet. The court held that although *res judicata* does not strictly apply to questions of law "when a fact or thing is adjudged in the

original action it cannot be disputed in a subsequent action."

Southern Pacific v. United States and *Cromwell v. Sac.,* supra, are cited with approval by the Supreme Court in *Tait v. West Maryland Railroad,* 289 U.S. 620; 53 S.Ct. 706. See also, *New Orleans v. Citizens Bank,* 167 U.S. 371; 42 L.Ed. 202.

Both *Southern Pacific v. United States* and *Tait v. West Maryland Railroad,* supra, were quoted at length in the recent case of *Union Bleachery v. United States,* 73 Fed. Supp. 496 (1947). In the subsequent action the court applied the rule of estoppel by judgment although the causes of action were entirely different.

The rule has been applied in cases of damages as was held in *Henderson v. U. S. Radiator Corp.,* 78 Fed. 2d 674. Here there was an original action by a wife and her husband for damages to their real property. Subsequently the wife sued for damages for her personal injuries and to her personal property. The damages in both suits arose from the same acts of negligence. The court held that the issue of negligence was finally determined in the first suit and the determination of those facts was binding upon the parties and the court in the second action.

The rule is again set forth in *Vapor Car Heating v. Cold Car Heating,* 7 Fed. 2d 284, 287, where the court states:

> "A question or fact, distinctly put in issue, and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies, or, even if the second suit is for a different cause of action, * * *."

The rule distinguishing between *res judicata* as to the entire cause of action and estoppel by judgment as to facts in issue determined by the prior Court is set forth in *Gottschalk Mfg. Co. v. Springfield Wire Co.,* 90 Fed. 2d 468, 471 as follows:

> "There is a difference sometimes overlooked, between the effect of a judgment as a bar to the prosecution of a second action for the same cause and its effect as an estoppel in another suit between the same parties upon a different cause of action. In the former case a judgment on the merits must be pleaded, and is an absolute bar to a subsequent action; it concludes the parties, not only as to every matter which was offered and received to sustain or defeat the suit, but also as to any other matter which might have been offered for that purpose. In the latter case, the judgment in the prior action may be offered in evidence, and operates as an estoppel only as to those matters which were there directly in issue and either admitted by the pleadings or actually tried."

The prior judgment by a state court is binding on a federal court as long as the original court had jurisdiction over the parties.

This Circuit has passed specifically on this point in *Lineker v. Marshall,* 7 Fed. 2d 878 (C.C.A. 9th) where there was an original suit in the Superior Court of Stanislaus County that gave judgment on a promissory note and trust deed. A subsequent action was brought in the federal courts based on a second trust deed. The court clearly stated that the second case in the federal courts was for a different cause of action than the previous suit in the Superior Court but the facts determined by the

Superior Court as to the amount due on the promissory note were binding. The opinion quotes at length from *Southern Pacific v. United States,* supra, and at page 878 states as follows:

> "* * * and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, must be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination."

Particularly in point is *Forsyth v. Hammond,* 166 U.S. 506; 41 L.Ed. 1095, where there was a state court decision in Indiana providing for the annexation of certain property owned by the plaintiff and taxes were levied against such property. Subsequently, the plaintiff brought an action in the Federal Court to enjoin the tax collection. The Federal Court reached a decision on the facts squarely contrary to the previous decision of the State Court. The Supreme Court *reversed* the lower court and at page 1100 of 41 L.Ed., states:

> "Though the form and causes of action be different a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions."

A similar case is *National Surety v. Ellison,* 88 Fed. 2d 309.

In *Continental Bank v. Holland Bank,* 66 Fed. 2d 823, the plaintiff recovered judgment against the defendant bank in a state court for $97,274.85. Thereafter the defendant bank was re-organized and subsequently liquidated under federal receivership. A new action was brought contesting the validity of the plaintiff's claims and it was alleged that the findings of the state court on the subject of the amount due was a miscarriage of justice. The Circuit Court held that the judgment of the state court was binding and, at page 829, stating:

> "Apparently counsel have misapprehended the force and effect of the state court judgment. Neither the United States District Court nor this court can by way of review or otherwise allow appellants to relitigate issues which were tried and determined against them in the state courts. Neither the findings of fact in the state court nor the sufficiency of the evidence adduced in support thereof are here open to question."

(2) The Award of Damages Was Contrary to the Evidence and Law Applicable Thereto.

We contend the detailed evidence received in the District Court compelled a judgment for the defendant, appellant. In relation to his position before induction, Kan agreed (1) his rate of pay was $500 per month and (2) the term of his employment was at the pleasure of the employer (he had no contract, written or oral, for any specific period).

As to the time when he sought reemployment, Kan agreed that although he wanted $750 per month, the last amount he asked the employer for was $500 per month and also he told the employer he would not return to

work unless he be given a written contract insuring his employment over a period of years; after so expressing himself he did not subsequently indicate otherwise.

The District Court held that Kan actually was entitled to $750 per month and that the employer breached his statutory obligations by not agreeing to restore the position at more than $500 per month (Tr. 26).

In this respect we contend the court was in error. The former employee had the undoubted right to accept a lesser pay than the maximum to which he was entitled. When he told the employer that $500 was the amount he "would be satisfied with" there could have been no obligation, statutory or otherwise, upon the employer to *insist* upon him taking more. In the absence of an obligation, no one could be responsible for damages for a breach.

The evidence showed demonstratively that the failure to effect a reemployment was due entirely to Kan's insistence upon a written contract of employment for an extended period.

Therein the fault lay with Kan, because he was not entitled to make any such requirement a condition precedent to his reemployment. He, therefore, was the one solely responsible for his not returning to work, by reason of which he has no ground to complain against the appellee. (That is exactly what the Superior Court held.)

(3) The Expiration of the Partnership Term Barred Any Relief.

In the Fifth Defense set forth in the Supplement to Answer (Tr. 12), it was pleaded that the partnership was for a three year term which expired October 1, 1946, whereas the trial and judgment were not until the fol-

lowing year (Tr. 20). At the latter time obviously the employment could not have been reinstated, either voluntarily or by any court order.

This returns us to the solemn assurance in 1946 by counsel for the petitioner that the Federal Court could and should take jurisdiction because the reemployment was the only relief sought herein, while conceding that it already had been competently adjudicated that he was entitled to no damages.

However, when realization of this point was reached, petitioner reversed to the exact opposite position and the only relief granted by the District Court was for damages.

(4) Petitioner Was Estopped From Any Relief.

The Sixth Defense pleaded in the Supplement to Answer (Tr. 13) asserted that subsequent to initiating this action and before trial, Kan brought another suit, i.e., San Francisco Superior Court No. 349,840, wherein he prayed for a judicial dissolution of said partnership; that said prayer was granted (albeit, by consent of all partners); that on August 30, 1946 (before the trial of this action) all of the assets of the partnership were sold by the receiver appointed in said proceedings and ever since there have been no partnership and no Cathay House business.

It also appeared that in said proceedings the Superior Court made an order that all creditors' claims against the partnership would have to be filed on or before August 26, 1946 or be forever barred; that Kan filed no claim within such time.

In other words, in August 1946, Kan was of record in the present proceeding that the only relief he was claim-

ing was for a return of his position, and not for damages, while contemporaneously he procured a dissolution of the partnership with an attending order that all claims (particularly including damages) would be barred unless asserted before August 30; then without ever filing any such claim, he subsequently reversed his position in the present case and demanded damages against the general partner, i.e., the partnership itself.

We submit that the relief granted against Tsang under such circumstances was abhorrent to all concepts of fairness and the courts should rule Kan to be estopped.

MISCELLANEOUS

The other specifications in the Statement of Points on Appeal (Tr. 255), i.e., items (6), (7) and (8), we believe are sufficiently covered by the argument under the preceding three headings.

CONCLUSION

Appellant prays that the judgment of the District Court be reversed with instructions to enter judgment in favor of defendants and for such other relief as may be proper.

Dated: July 10, 1948.

Respectfully submitted,

Robert E. Hatch,
Attorney for Appellant.

Lemuel H. Matthews,
Of Counsel for Appellant.